

(5)  
No. 91-615

Supreme Court, U.S.  
FILED

FEB 10 1992

OFFICE OF THE CLERK

**In the  
Supreme Court of the United States.**  
October Term, 1991

---

ALLIED-SIGNAL, INC.,  
as successor-in-interest to  
THE BENDIX CORP.,  
Petitioner,

v.

DIRECTOR, NEW JERSEY  
DIVISION OF TAXATION  
Respondent.

---

ON WRIT OF CERTIORARI TO  
THE SUPREME COURT OF NEW JERSEY

---

**BRIEF FOR AMICI CURIAE MASSACHUSETTS,  
CONNECTICUT, MARYLAND and VIRGINIA  
SUPPORTING RESPONDENT**

---

Scott Harshbarger  
Attorney General  
of Massachusetts

Thomas A. Barnico\*  
Assistant Attorney General  
One Ashburton Place  
Boston, Massachusetts 02108  
(617) 727-2200

\*Counsel of Record  
See Inside Cover for Other Counsel.

Other Counsel

Richard Blumenthal  
Attorney General of Connecticut

J. Joseph Curran  
Attorney General of Maryland

Mary Sue Terry  
Attorney General of Virginia

## TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF AMICI CURIAE	2
ARGUMENT	5
I.    THE COURT BELOW APPLIED THE CORRECT LEGAL STANDARD WHEN IT JUDGED WHETHER BENDIX' INVESTMENT WAS PART OF A UNITARY BUSINESS STRATEGY OF ACQUISITION AND DIVESTITURE.	5
II.   THE COURT BELOW MADE A "PERMISSIBLE JUDGMENT" THAT BENDIX' INVESTMENT IN ASARCO WAS PART OF ITS "UNITARY" BUSINESS.	11
CONCLUSION	18

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
ASARCO, Inc. v. Idaho State Tax Commission, 458 U.S. 307 (1982)	9
Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983)	6, 7, 14
Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980)	5, 6
Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978)	6

**MASSACHUSETTS GENERAL LAWS**

**Page**

M.G.L. Ann. c. 63, §§ 30,  
33 and 39A (West 1988 ed.  
and 1991 Supp.)

3

**MISCELLANEOUS**

United States Supreme Court  
Rule 37.5

2



No. 91-615

---

**IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1991**

---

ALLIED-SIGNAL, INC.,  
as successor-in-interest to  
THE BENDIX CORP.,

Petitioner,

v.

DIRECTOR, NEW JERSEY  
DIVISION OF TAXATION,

Respondent.

---

**ON WRIT OF CERTIORARI  
TO THE SUPREME COURT OF NEW JERSEY**

---

BRIEF FOR AMICI CURIAE  
MASSACHUSETTS, CONNECTICUT,  
MARYLAND and VIRGINIA  
SUPPORTING RESPONDENT

---

The Commonwealths of Massachusetts  
and Virginia and the States of  
Connecticut and Maryland, through their  
Attorneys General, submit this brief

amici curiae in support of respondent Director, Division of Taxation, State of New Jersey. No consent to this filing is required. United States Supreme Court Rule 37.5.

### INTEREST OF AMICI CURIAE

The issue presented in this case is whether a State may constitutionally tax a non-domiciliary corporation doing business in the State, on an apportioned percentage of the income derived by the corporation from a minority stock investment, where the investment is integral to the corporation's operational strategy, but where there is no functional integration between the corporation and the entity in which the minority stock investment is held.



Amici have a substantial interest in this issue. Hundreds of non-domiciliary corporations conduct business in the amici States, and are subject to tax on the income attributable to that business. See, e.g., Mass. Gen. Laws Ann. c. 63, §§ 30, 33 and 39A (West 1988 ed. and 1991 Supp.). For example, the Massachusetts corporate excise tax is substantially similar to the New Jersey tax at issue in this case. The Massachusetts tax, like the New Jersey tax, includes in its measure all income derived from the unitary business activities of non-domiciliary corporations, subject to apportionment under a formula used to approximate the income derived from business conducted in Massachusetts.

Corporate taxpayers routinely claim that amici may not include investment income in the apportionable income absent proof that (1) the taxpayer holds a controlling interest in the investment entity, and (2) "functional integration" exists between the taxpayer's operations and those of the investment entity. In Massachusetts alone, corporations currently seek approximately \$100 million in state tax abatements on these grounds and the similar grounds argued by the petitioner in this case. A decision in this case therefore may have a profound impact on the fiscal health of the amici. For the reasons stated below, the decision of the Supreme Court of New Jersey should be affirmed.

## ARGUMENT

I.    **THE COURT BELOW APPLIED THE  
CORRECT LEGAL STANDARD WHEN  
IT JUDGED WHETHER BENDIX'  
INVESTMENT WAS PART OF A  
UNITARY BUSINESS STRATEGY  
OF ACQUISITION AND  
DIVESTITURE.**

The New Jersey Supreme Court applied the correct legal standard in this case. The court determined whether Bendix' investment in ASARCO was part of a unitary business strategy of acquisition and divestiture. This standard was fully consistent with the Constitution and prior decisions of this Court.

In order to tax the income of multi-jurisdictional corporations, a State must observe restrictions imposed by the Due Process and Commerce Clauses of the Constitution. See Mobil Oil

Corp. v. Commissioner of Taxes, 445 U.S. 425, 436, 443 (1980). For example, a State may tax income only if there is "a 'minimal connection' between the interstate activities and the taxing State[.]'" Id. at 436-37 (quoting Moorman Mfg. Co. v. Bair, 437 U.S. 267, 272-273 (1978)). This requirement is met if the income taxed is derived from a "unitary business." See Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. at 439.

The Court addressed the "unitary business" principle most recently in Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983). Container Corp. requires that "the out-of-state activities of the purported 'unitary business' be related in some concrete way to the in-state

activities." Id. at 166. "The functional meaning of this requirement is that there be some sharing or exchange of value not capable of precise identification or measurement -- beyond the mere flow of funds arising out of a passive investment or a distinct business operation -- which renders formula apportionment a reasonable method of taxation." Id. (citations omitted).

Under this standard, the Court presumes that the state tax is constitutional. Id. at 170, 175. Thus, the Court will not turn "every colorable claim that a state court erred in a particular application of [unitary business] principles into a de novo adjudication[.]" Id. at 176 (footnote omitted). Instead, the Court will, "if

reasonably possible, defer to the judgment of state courts in deciding whether a particular set of activities constitutes a 'unitary business.'" Container Corp., 463 U.S. at 175.

The New Jersey Supreme Court ruled that Bendix' investment in ASARCO was sufficiently related to the unitary business of Bendix to permit New Jersey to include income derived by Bendix from the investment in the income subject to apportionment. The court held that "[w]hen capital investment activities are long-term integral operational corporate functions rather than passive investment functions, they can serve as the basis for concluding a unitary business exists." Pet. 19a.

This holding is consistent with the Constitution and decisions of this

Court. The New Jersey Supreme Court recognized that investments often "have as their goals the growth and expansion of existing corporate business activities. . . . " Id. The court held that investment decision-making that is substantially related to the pursuit of other business goals may reflect a unitary business strategy and justify unitary tax treatment.

The economic realities invoked by the New Jersey Supreme Court are well illustrated by a comparison of the tax treatment of a stock investment and long-term debt. Long-term borrowings are routinely treated as integral to a unitary business "justifying the deduction of interest expense in the computation of apportionable net income." ASARCO, Inc. v. Idaho State

Tax Commission, 458 U.S. 307, 339 (1982) (O'Connor, J., dissenting). Indeed, in this case, Bendix' Chief Executive Officer made no distinction between investments financed by "excess cash, or excess borrowing capacity." In fact, he urged that investments of the ASARCO type be undertaken whenever available cash or excess debt capacity permitted. (J.A. 135). Here, Bendix financed at least a portion of its acquisition of ASARCO stock from borrowings. Pet. 41a. There is no evidence in the record that Bendix excluded the resulting interest expense in computing its apportionable income for 1981 or the prior years. Nonetheless, Bendix now contends that the income generated from the very same investment must be excluded in computing its income subject to apportionment.



The test applied by the New Jersey Supreme Court would treat income and interest expense consistently. The test applied below would permit a taxpayer to deduct its interest expense but require it to include the income on its investment, where both interest expense and income are part of a centralized and unitary corporate strategy. Nothing in the Constitution forecloses the use of this test.

**II. THE COURT BELOW MADE A  
"PERMISSIBLE JUDGMENT" THAT  
BENDIX' INVESTMENT IN  
ASARCO WAS PART OF ITS  
"UNITARY" BUSINESS.**

The New Jersey Supreme Court ruled that Bendix' investment in ASARCO was part of a unitary business strategy of acquisition and divestment. This ruling

was amply supported by undisputed facts in the record.

Bendix, by virtue of its minority stockholdings in ASARCO, gained two seats on the ASARCO Board of Directors. One of the seats was held by Bendix' chief executive officer, who reported regularly to Bendix on the performance of the ASARCO investment.

The ASARCO investment was motivated at least in part by Bendix' need for good cash flows "to meet growing capital needs, particularly in aerospace [and] electronics to permit it to hold its own in stiffening markets." (J.A. 120). Bendix planned that strong profits from its investment would further its long range growth and acquisition planning. (J.A. 87). Bendix also planned to gain an inside view of ASARCO's business

while it weighed a more substantial foray into the nonferrous metal industry. (J.A. 104).

Bendix also considered its 20% ownership interest sufficient to provide it considerable influence on the ASARCO board. (J.A. 104). Bendix' Chairman and Chief Executive Officer, Mr. Agee, observed that with a 20% interest and "friendly relations, our insights and judgments will be recognized. Our shareholdings [will] always make us a force to be reckoned with." (J.A. 128).

The decision to place Mr. Agee on the ASARCO Board of Directors likewise was intended to increase Bendix' influence and further Bendix' strong centralized management of its businesses. Thus, after Bendix purchased the ASARCO stock, Mr. Agee

personally managed Bendix' investment in the same personal manner in which he managed Bendix' operational units.

E.g., J.A. 31-33. This evidence amply supported the judgment of the court below that Bendix' acquisition and use of its ASARCO Stock went well beyond a "passive investment." Container Corp. of Am., 463 U.S. at 166. See J.A. 83 (Bendix conceded that its investment was not passive in the sense of an investment in a mutual fund).

Nor did Bendix meet its burden to show that its investment in ASARCO was one in a "distinct business" segregated from its unitary business. Container Corp., 463 U.S. at 166. The Court has required that a taxpayer make a showing by "clear and cogent evidence" on this point. Id. at 175. At most, Bendix

showed that it had no direct relationship to ASARCO's operations. The record, however, amply supported the ruling below that Bendix' ASARCO investment was an integral part of a unitary business strategy of acquisition and divestment. (J.A. 189). For example, the acquisition of ASARCO stock was touted in Bendix' 1978 Annual Report as the single largest investment in company history and one which strengthened Bendix by "a substantial diversification into nonferrous metals and minerals". (J.A. 190). Similarly, Bendix' decision to sell its ASARCO stock furthered its unitary business strategy of acquisition and divestment. "[I]t was the convergence of several kinds of interlocking and interrelated decisions that caused [Bendix] to

consider [the sale of ASARCO stock]".

(J.A. 62) (testimony of Mr. Agee).

Bendix' plans to acquire Martin Marietta played a major role in its decision to sell the ASARCO holdings. (J.A.

77-81). According to Mr. Agee, Martin Marietta would be a "complementary"

business which would "deepen[]" Bendix' "commitment to the aerospace industry."

Pet. 11a. The recommendations to sell ASARCO stock and acquire Martin Marietta were made by Bendix' corporate planning department and approved by its president. (J.A. 78-80). Bendix sold its ASARCO stock in order to finance a larger corporate acquisition of a new business closer to its core business.

The above evidence show that Bendix failed to meet its burden to show that its decisions to buy and sell its ASARCO

holdings were mere passive investments or divestments segregated from its unitary business. Indeed, though the state bore no burden of proof, it was New Jersey which produced "clear and cogent" evidence that Bendix was conducting a unitary business. Thus, the New Jersey Supreme Court correctly held that Bendix' investment in ASARCO was part of its unitary business strategy of acquisition and divestment. New Jersey therefore properly included Bendix' gain on the sale of its ASARCO stock in the income subject to apportionment.

## CONCLUSION

For the reasons stated above, the decision of the New Jersey Supreme Court should be affirmed.

Respectfully submitted,

SCOTT HARSHBARGER  
ATTORNEY GENERAL OF  
MASSACHUSETTS

Thomas A. Barnico\*  
Assistant Attorney General  
One Ashburton Place  
Boston, Massachusetts 02108  
(617) 727-2200, ext. 2086

Robert A. Carleo, Jr.  
Massachusetts Department  
of Revenue  
100 Cambridge Street  
Boston, MA 02202  
(617) 727-7150

Dated: February 10, 1992

WFFLE/011

\*Counsel of Record  
Additional Counsel On Next Page



Other Counsel

Richard Blumenthal  
Attorney General of  
Connecticut

J. Joseph Curran  
Attorney General of  
Maryland

Mary Sue Terry  
Attorney General of  
Virginia

Dated: February 10, 1992  
WDPLE/011